STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

J. D. FULLER, JR.,

Defendant-Appellant.

UNPUBLISHED
January 13, 2005

No. 251892
Wayne Circuit Court
LC No. 03-006927-01

Before: Neff, P.J., and Cooper and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of seven counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a) (sexual penetration with a person under the age of thirteen), and two counts of second-degree CSC, MCL 750.520c(1)(a) (sexual contact with a person under the age of thirteen). He was sentenced to concurrent prison terms of seventeen to forty years each for the first-degree CSC convictions and 2-1/2 to 15 years each for the second-degree CSC convictions. We affirm.

Defendant was the senior pastor at a church in Ypsilanti. The victims in this case are defendant's granddaughters, age ten, and age six, and they occasionally attended defendant's church services. The victims stayed in defendant's home in Detroit for several days at a time while their mother worked. Three of defendant's first-degree CSC convictions and one of his second-degree CSC convictions pertained to the younger victim. At trial, the younger victim testified that defendant touched her genitals on several occasions. Four of defendant's first-degree CSC convictions and one of his second-degree CSC convictions pertained to the older victim, who testified to several incidents of fellatio and digital penetration with defendant.

I.

Defendant contends that there was insufficient evidence to support his three first-degree CSC convictions involving the younger victim because her testimony described only non-penetrative sexual contact. Challenges to the sufficiency of the evidence in criminal trials are reviewed de novo to determine whether, viewing the evidence in a light most favorable to the prosecutor, any rational trier of fact could have found that the essential elements of the crime

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

were proven beyond a reasonable doubt. *People v Randolph*, 466 Mich 532, 572; 648 NW2d 164 (2002).

First-degree CSC involves acts of sexual penetration under the circumstances delineated by the statute, including acts with a person under thirteen years of age. MCL 750.520b(1)(a). MCL 750.520a(o) defines "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." The younger victim testified that defendant moved his hand around under her underpants while they sat on a couch under a blanket in defendant's home. Although she did not use precise anatomical terms to describe these incidents, when asked what part of her body defendant touched, she replied, "my tutu," "[m]y private part," or "my private," which she described as the part of her body that she used to urinate and that she wiped with tissue after urinating. Similarly, the older victim stated that she saw defendant stick his finger in the younger victim's "private part." The younger victim stated that the touching felt uncomfortable, it did not tickle, and that it hurt when "[h]e was doing it hard." She estimated that it happened more than three times. The prosecutor asked the younger victim to put her hand on a table and demonstrate what defendant did with his hand. She stuck out her finger during the demonstration and stated that he moved his finger back and forth, hard, on her "private."

The testimony of both victims about defendant touching the younger victim, viewed most favorably to the prosecution, was sufficient to establish that penetration of the younger victim occurred. Although the younger victim used childish and unsophisticated terminology, she indicated that defendant touched the part of her body that she used to urinate. This testimony, together with the testimony describing the amount of pressure defendant applied, allowed the jury to infer that defendant touched the younger victim between the labia. An intrusion into the labia constitutes penetration of the female genital opening under MCL 750.520a(o). *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981); see also *People v Legg*, 197 Mich App 131, 133; 494 NW2d 797 (1992) (the act of cunnilingus described by the complainant involved penetration because the complainant testified that the defendant touched the part of her body that she "[went] to the bathroom with"). Furthermore, her demonstration with her finger suggested that defendant prodded into her genital opening when he touched her. Consequently, a trier of fact could find from the younger victim's testimony that defendant engaged in sexual penetration within the meaning of the statute.

The younger victim also described incidents in which defendant used cotton balls to put cream or oil "inside" or "in" her private parts. She also stated that defendant put his finger "inside" her bottom, but when the prosecutor questioned her further, she did not know if he touched her anus or the cheeks of her buttocks. She admitted that she had not disclosed these incidents before trial. Defendant does not dispute that this testimony was sufficient to establish penetration, but he contends that these incidents were not the incidents for which he was charged because she did not reveal them before trial.

Defendant did not argue at trial that the "additional" incidents were inadmissible, or take other steps to differentiate between charged and uncharged acts of CSC with the younger victim. The Felony Information broadly charged defendant with acts committed between January 2001 and May 2003, and defendant did not complain that the Felony Information was not sufficiently specific. MCL 767.45(1)(b); MCL 767.51. Because her testimony about the incidents on the

couch sufficiently established the penetration element, we reject defendant's claim that he could not have been convicted of first-degree CSC without this "additional" evidence. Consequently, any error with respect to the admission of this "additional" evidence is subject to review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). For the reasons discussed in part II, *infra*, we conclude that appellate relief is not warranted.

Defendant also claims that the evidence was insufficient to support his second-degree CSC conviction involving the younger victim because the prosecutor did not identify any specific acts of sexual contact that did not involve penetration. Second-degree CSC requires proof that the defendant intentionally touched the complainant's intimate parts for purposes of sexual arousal or gratification. MCL 750.520c(1)(a); MCL 750.520a(n); *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). Second-degree CSC is a cognate lesser offense of first-degree CSC because the second-degree offense requires proof that the defendant acted with the intent to seek sexual arousal or gratification. *Lemons, supra* at 253-254. Consequently, it is possible to commit first-degree CSC without first committing second-degree CSC, but in most cases, second-degree CSC is a factually included offense within first-degree CSC. *Id.* at 524 n 29.

Here, defendant does not claim that the prosecutor failed to prove the sexual arousal or gratification element of second-degree CSC. Rather, he contends that the prosecutor could not establish an act of second-degree CSC without identifying an act of sexual contact that did not involve penetration. However, the absence of penetration is not an element of second-degree CSC and, as our Supreme Court recognized in *Lemons, supra* at 254 n 29, second-degree CSC is a factually included offense within first-degree CSC if the arousal or gratification element is established. The younger victim testified that there were more than four incidents when defendant touched her inappropriately. Therefore, the jurors could have considered one of the incidents as an act of second-degree CSC, while considering three other incidents as acts of first-degree CSC.

II

Defendant argues that the trial court improperly permitted the victims to testify about uncharged acts of sexual abuse in violation of MRE 404(b). Defendant contends that the evidence was inadmissible character evidence under MRE 404(b)(1), and that the prosecutor failed to give notice of her intent to use the evidence as required by MRE 404(b)(2). There was no clear distinction at trial between charged acts and uncharged acts in the younger victim's testimony, although defendant claims that the incidents involving the cotton ball and the incidents involving her buttocks were not charged. For purposes of analyzing this issue, we assume that these incidents related to uncharged offenses. With respect to the older victim, the prosecutor expressly distinguished between the charged acts of fellatio and digital penetration, and uncharged acts involving anal intercourse and penile-genital penetration that stopped short of vaginal penetration.

This issue is unpreserved because defense counsel failed to object to the evidence at trial. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Therefore, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763-764. Defendant must establish: (1) that an error occurred, (2) that the error was plain, i.e., clear

or obvious, and (3) that the error affected substantial rights, i.e., affected the outcome of the lower court proceedings. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). "Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." *Id.*

A prosecutor may not introduce evidence of other crimes, wrongs, or acts in order to prove a defendant's character or propensity for criminal behavior. MRE 404(b). The prosecutor argues that the evidence of uncharged acts was properly admitted pursuant to *People v DerMartzex*, 390 Mich 410, 413; 213 NW2d 97 (1973). However, in *DerMartzex*, *id.* at 415, our Supreme Court held that evidence of other sexual acts between a defendant and his victim may be admissible if the defendant and the victim live in the same household and if, without such evidence, the victim's testimony would seem incredible. Because the victims' testimony about the charged incidents was itself sufficient to establish the ongoing pattern of abuse, without delving into additional incidents, the rationale underlying the decision in *DerMartzex* is not applicable here.

Next, we consider whether the uncharged incidents were admissible to show a scheme, plan, system, or for some other permissible, non-propensity purpose under MRE 404(b)(1). We apply the following analysis:

> In *People v VanderVliet*, 444 Mich 52, 74-75, 508 NW2d 114 (1993), this Court articulated the factors that must be present for other acts evidence to be admissible. First, the prosecutor must offer the "prior bad acts" evidence under something other than a character or propensity theory. Second, "the evidence must be relevant under MRE 402, as enforced through MRE 104(b)[.]" Id. Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).]

The Court explained, "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Id.* at 510, quoting *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000).

The younger victim's uncharged acts were sufficiently similar to the charged acts to satisfy these requirements. Notwithstanding the detail about the cotton balls, both the charged and uncharged acts generally involve manual sexual contact, and the uncharged acts are not more egregious than the charged acts. As discussed previously, the younger victim's descriptions of both the charged and uncharged acts established the penetration element, so defendant cannot validly claim that the uncharged acts were more egregious on this basis.

With respect to the older victim, however, we find that the uncharged acts are not sufficiently similar to the charged acts to satisfy the four-part test under *VanderVliet* and *Knox*. The charged acts pertaining to the older victim involved fellatio or digital penetration, whereas the uncharged acts involved anal intercourse or genital-to-genital contact that came close to

vaginal intercourse. We therefore conclude that the evidence did not serve a non-propensity purpose. However, the evidence did not affect defendant's substantial rights. *Jones, supra* at 355. The older victim's testimony about intercourse or near-intercourse was not substantially more prejudicial than her testimony about repeated acts of fellatio or digital penetration, and we cannot say that this additional evidence affected the outcome of defendant's trial.

Defendant further claims that the prosecutor violated MRE 404(b)(2) by failing to provide notice that she intended to introduce evidence of uncharged offenses. Because the evidence involving the younger victim was properly admitted, defendant cannot establish that the prosecutor's failure to comply with MRE 404(b)(2) affected his substantial rights. *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192 (2004). Defendant has not shown that he would have offered rebuttal evidence or taken other effective action if the prosecutor had provided timely notice under MRE 404(b)(2). *People v Hawkins*, 245 Mich App 439, 455-456; 628 NW2d 105 (2001). Although we have concluded that the evidence pertaining to the older victim was not admissible, our conclusion that the older victim's testimony did not affect defendant's substantial rights also applies to the notice issue.

Defendant also claims that he was denied the effective assistance of counsel because trial counsel failed to object to the evidence. To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The first prong is not satisfied with respect to the younger victim because the evidence was admissible under MRE 404(b)(1). Although defense counsel may have successfully objected to the older victim's testimony, their failure to do so did not affect the outcome of defendant's trial. The two victims testified in detail that defendant committed numerous acts of CSC while they were in his care. There is no reasonable likelihood that the older victim's improper testimony concerning some additional acts affected the outcome of defendant's trial.

III

Defendant argues that the trial court erred in allowing the prosecution to call the victims' grandmother—defendant's former girlfriend—as a rebuttal witness. We review this evidentiary issue for an abuse of discretion. *People v Vasher*, 449 Mich 494, 505-506; 537 NW2d 168 (1995).

As our Supreme Court explained in *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996):

> [T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief. [Citations omitted.]

The testimony of the victims' grandmother, that defendant was able to mount his motorcycle and get on the ground to look underneath a car, was responsive to defendant's testimony that hip problems caused him constant pain and made every position very uncomfortable.[1] It was also responsive to the testimony of defendant and his wife that defendant had to stand when they had sexual relations because he could not lie down comfortably. Also, the testimony that defendant did not respond to the younger victim's accusations until she prompted him, was responsive to defendant's testimony that he immediately denied the accusations and immediately tried to explain that he only touched the younger victim's thigh when he applied an ointment to her rash. The victims' grandmother also testified that the children had never been simultaneously afflicted with rashes, which was responsive to the testimony of defendant and his wife that they once treated the children's rashes by putting ointment on their thighs.

Defendant argues that the testimony of the victims' grandmother was not proper rebuttal testimony because it did not precisely contradict his testimony on direct examination. For example, he claims that her testimony about the motorcycle was not proper because he never testified that his hip injuries prevented him from riding the motorcycle. To be admissible as rebuttal evidence, the evidence must merely be "responsive to material presented by the defense." *Figgures, supra* at 399. The testimony of the victims' grandmother was sufficiently responsive to defendant's testimony that chronic pain and physical limitations prevented him from committing the charged sexual acts, that he immediately denied the victims' accusations when their mother and their grandmother first confronted him, and that the accusations were probably derived from an occasion where defendant and his wife applied ointment to the younger victim's thighs because she had a rash there. Therefore, the trial court did not abuse its discretion in allowing the rebuttal testimony of the victims' grandmother.

IV

Finally, defendant argues that he is entitled to resentencing because he was improperly sentenced by a judge who did not preside at his trial. Defense counsel acknowledged at sentencing that the sentencing judge was not the trial judge and raised no objection.

MCR 2.630 provides that a different judge may be assigned to perform post-verdict duties if the judge before whom an action was tried is unable to perform the duties because of death, illness, or other disability. In *People v Robinson*, 203 Mich App 196, 197; 511 NW2d 713 (1993), and *People v Humble*, 146 Mich App 198, 200; 379 NW2d 422 (1985), this Court observed that a defendant who pleads guilty is ordinarily entitled to be sentenced before the judge who accepted the guilty plea, provided the judge is reasonably available. In *Humble*, this Court remanded for resentencing because the record was silent with regard to whether the original judge was "reasonably available" to sentence the defendant. *Id.* at 200. In *Robinson*, however, this Court held that the defendant waived his right to be sentenced by the same judge who accepted his guilty plea because he raised no objection after being informed that a different judge would sentence him. *Id.* at 197-198.

[1] Defendant sustained hip injuries that resulted in the total replacement of one hip and the insertion of eight pins in the other hip.

Defendant now argues that he is entitled to resentencing because the record is silent concerning whether the trial judge was available on the sentencing date. He also contends that the record is silent concerning whether he waived his right to be sentenced by the trial judge. Although the record contains no information regarding the trial judge's availability, defendant clearly waived his right to be sentenced by the trial judge when defense counsel acknowledged the change and raised no objection. Defendant argues that this case is distinguishable from *Robinson* because that defendant waived his right at the time his plea was accepted, whereas defendant here did not do so until the date of sentencing. This distinction is of no consequence; the salient fact is that defendant waived his right after learning that a different judge would impose his sentences.

Affirmed.

/s/ Janet T. Neff
/s/ Jessica R. Cooper
/s/ Roman S. Gribbs